

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

**SHAHER REDI-MIX, INC.¹
AND SHAHER BROTHERS, INC.**

A Single Employer

and

CASE 7-RC-22150

**LOCAL 164, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO**

Petitioner

APPEARANCES:

Timothy J. Ryan and Elizabeth Welch Lykins, Attorneys, of Grand Rapids,
Michigan, for the Employer
Nathan D. Eisenberg, Attorney, of Milwaukee, Wisconsin, for the Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c), of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:²

¹The Employer's name appears as corrected at the hearing.

² Both parties filed briefs, which were carefully considered.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Employer named in the petition is Shafer Redi-Mix, Inc. ("Redi-Mix"), whose 20 ready-mix truck drivers Petitioner seeks to represent. Redi-Mix would add two dispatchers and three boom truck drivers to the unit. Four of the disputed individuals are employed by Shafer Brothers, Inc. ("Brothers"), which Redi-Mix contends is its partner in a single integrated enterprise known as the Shafer Companies. Petitioner urges that the single employer issue should be decided against Redi-Mix on due process and substantive grounds. It further claims that dispatchers and boom truck drivers lack a community of interest with the sought drivers, and that dispatchers are statutory supervisors.³

Redi-Mix manufactures and delivers ready-mix concrete at and from its headquarters in Albion, Michigan. It is owned by Gerald Shafer, who serves as Redi-Mix's president and chief executive officer. His wife Esther is Redi-Mix's secretary and treasurer. Brothers, which occupies space at the same Albion facility, manufactures and delivers concrete septic tanks. The Shafers' sons, Douglas and David, are the owners and officers of Brothers. Redi-Mix and Brothers are separately incorporated but share a single general manager, Judd Snyder, who is the sole supervisor of both companies' workforces.⁴ Esther Shafer is the signatory on the paychecks issued to all Shafer Companies personnel.

The two dispatchers at issue are Steve Stilson, who is on Redi-Mix's payroll, and Don Cockroft, who is on Brothers' payroll. Both are stationed at the Albion facility and, as far as the record reveals, perform the same four basic

³ The petition as amended at the hearing seeks the inclusion as well of bulk truck drivers. No party objected to the inclusion of bulk drivers in the unit, but no evidence was adduced regarding this classification, and neither party referred to it on brief, so the number, duties, working conditions, and company affiliation of bulk truck drivers are unknown.

⁴ By virtue of his authority to discipline and establish wage rates for employees, I find that Snyder is a supervisor within the meaning of Section 2(11) of the Act.

functions of taking customer orders, batching concrete, dispatching drivers, and driving.

Customer calls are directed to a dispatcher, who enters details of the customer's order, its site, and its preferred delivery time onto a log sheet and into a computer.⁵ The company has invested in a computerized batching system that automatically mixes and dispenses aggregate and cement in the desired proportions into an awaiting ready-mix truck. The dispatcher presses the necessary buttons on the console to dispense the components into the rotating drums of the ready-mix drivers' trucks. Drivers transport product to the customer and return to receive the next load. When a customer requires more wire mesh, reinforcement bar, or other concrete supplies than a ready-mix truck can carry, a dispatcher will send a boom truck driver to accompany a ready-mix driver to the same destination.

Scheduling the 20 ready-mix drivers and 3 boom truck drivers is another responsibility of the dispatchers. The dispatchers prepare daily schedules with staggered starting times tailored to customer delivery demands. Individual drivers draw starting times based on their seniority. The draft schedule is submitted daily to General Manager Snyder, who sometimes modifies it, e.g., to accommodate a driver's time-off request about which the dispatcher was unfamiliar. A driver aggrieved that seniority was not properly followed brings his complaint to General Manager Snyder for investigation and resolution.

As drivers return to the Albion plant, dispatchers either redeploy them in the field or give them tasks to perform while they wait for their next load. Such chores might include washing trucks, taking out garbage, sweeping the floor, or shoveling around the pit. There is no evidence that drivers' pay varies depending upon the nature of their assigned task. Dispatchers inform drivers when they may take their unpaid one-half hour lunch period and when they may punch out for the day.

If delivery requirements cannot be handled by available drivers, either because customer demand is high or drivers are absent, dispatchers will drive trucks. Dispatchers may also drive if a truck needs to be moved or taken for service work. Each of the dispatchers drives a ready-mix truck about once weekly. Dispatcher Cockroft also drives a boom truck about three or four times per month. Both of the current dispatchers are seasoned, former drivers of the Shafer Companies, Stilson having operated both ready-mix and boom trucks, and Cockroft having been a boom truck driver.

⁵ It is clear from the record that both dispatchers handle ready-mix customers' orders. Whether they also take septic tank customers' orders was not specifically addressed in testimony or on brief.

Dispatchers have no authority to hire, fire, or discipline employees. Drivers' time-off requests go to General Manager Snyder, who alone has authority to pass upon them. Dispatchers may not decide on their own whether to excuse a driver's lateness or absence. General Manager Snyder's six-month review of each driver's performance influences his determination whether to grant a merit wage increase. Dispatchers have no input in those decisions, nor are they involved in interviewing, or setting wages or benefits of, new hires.

Dispatchers attend periodic meetings with company managers, at which times they offer anecdotal reports of situations or problems. They also apprise General Manager Snyder of circumstances regarding drivers at other times. No evidence contradicts General Manager Snyder's testimony that dispatchers give "descriptions" but do not make "recommendations" regarding personnel and performance subjects.

While Redi-Mix makes concrete year-round, outside customer demand is seasonal. As a consequence, many drivers will be on layoff status during some portion of the colder months. Once a driver's seniority has prevented him from getting on the schedule for about a month, General Manager Snyder makes the decision whether to classify him as laid off.

The same handbook of rules and benefits covers all full-time employees of the Shafer Companies, drivers and dispatchers alike. All are hourly paid. The two incumbent dispatchers, veteran drivers themselves, receive the top hourly rate of the ready-mix driver wage range. Unlike drivers, dispatchers undergo a Dale Carnegie management course, the exact syllabus of which was not disclosed at the hearing. There is no evidence that dispatchers receive any other specialized training, other than learning how to operate the computerized batch console. Once a satellite facility in Jackson, Michigan, is fully operational, ready-mix drivers will operate the same computerized apparatus there to fill their own truck drums without the aid of a dispatcher.

Boom trucks are flat-beds equipped with a large crane. As noted above, Brothers' three boom truck drivers transport and deliver septic tanks. They appear on the same schedule as ready-mix drivers.⁶ They are supervised by General Manager Snyder, as are ready-mix drivers and dispatchers, and are subject to the same company handbook. Boom truck drivers earn from \$14.00 to \$15.20 per

⁶ This evidence, along with dispatcher Cockroft's being on the Brothers payroll, implies that dispatchers take septic tank as well as ready-mix orders and that they schedule boom truck drivers accordingly. However, the record does not explicitly settle those questions, nor does it reveal how, if at all, the duties of the two dispatchers are divided.

hour, while ready-mix drivers are paid from \$13.96 to \$15.96. All drivers are required to have a commercial driver's license with air brake endorsement.

A ready-mix driver will be asked to operate a boom truck about once or twice each month. Boom truck drivers will be assigned ready-mix rigs about two or three times weekly. Cross-assignments are more frequent in the winter. While it is evident that a boom truck driver may permanently become a ready-mix driver, as did Steve Stilson, and that drivers may become dispatchers, as did both current dispatchers, the frequency of these transfers was not disclosed.

The primary supervisory indicia enumerated in Section 2(11) of the Act are read in the disjunctive, so that possession of any one of the 12 listed authorities can invest an individual with supervisory status. The burden of proof rests with the party seeking to exclude the individual as a supervisor. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Benchmark Mechanical Contractors*, 327 NLRB 829 (1999). The Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Unifirst Corp.*, 335 NLRB No. 58, slip op. at 8 (Aug. 27, 2001). To separate straw bosses from true supervisors, the Act prescribes that the exercise of supervisory indicia be in the interest of the employer and require the use of independent judgment. This means that neither the discharge of Section 2(11) functions in a routine and clerical manner, nor the use of independent judgment to solve problems unrelated to Section 2(11) functions, qualifies as supervisory. *Alois Box Co.*, 326 NLRB 1177 (1998).

Petitioner contends that by assigning runs and tasks to drivers, controlling their schedules, and keeping deliveries flowing, dispatchers are empowered to suspend, lay off, recall, discipline, and responsibly direct them. Although dispatchers direct the workflow, answer the phone, and take care of customer concerns, these functions are not necessarily supervisory. *Ryder Truck Rental*, 326 NLRB 1386 (1998). Similarly, assignment of work and direction of employees do not constitute supervisory authority when exercised in a routine manner or by dint of greater job experience. *S.D.I. Operating Partners*, 321 NLRB 111 (1996); *Brown & Root*, 314 NLRB 19, 21-22 (1994); *Sanborn Telephone Co.*, 140 NLRB 512, 515 (1963). The key ingredient is whether the dispatchers use independent judgment in so acting. *Masterform Tool Co.*, 327 NLRB 1071 (1999).

Dispatchers prepare schedules and allocate runs based upon driver seniority. There is no showing that their assignment of ancillary maintenance tasks is anything other than routine, or even that they may compel compliance. As far as the record reveals, their decisions as to when drivers may break for lunch and leave for the day are influenced solely by the amount of work to be done.

Petitioner has not met its burden to show that such direction entails the requisite degree of independent judgment. *Masterform Tool Co.*, supra (independent judgment not established because giving permission to leave early may have followed established policy); *Cable Car Charters*, 322 NLRB 554, 560 (1996) (dispatcher merely a conduit for assignments made by others); *Carry Cos.*, 311 NLRB 1058 fn. 1 and 1064 (1993), enfd. 30 F.3d 922 (7th Cir. 1994) (lacking independent judgment, dispatchers not supervisory despite directing and assigning employees, signing timecards, and issuing warnings); *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429, 430 (1991) (directions given by batchers in ready-mix company reflective simply of policies and priorities set by management); *Bay Area - Los Angeles Express*, 275 NLRB 1063, 1075-1080 (1985) (dispatcher who makes routine work assignments, relays customer information to drivers, and carries out manager's orders not a supervisor); *B. P. Oil*, 256 NLRB 1107, 1109 (1981), enfd. 681 F.2d 804 (3rd Cir. 1982) (award of overtime and transfers by dispatchers not supervisory where done by seniority and preexisting priorities); *Fisher Foods*, 245 NLRB 685, 687-688 (1979) (dispatchers who assign runs and call in employees by seniority not supervisors).

In an effort to prove that dispatchers have discretion, Petitioner elicited testimony from one driver that a *former* dispatcher departed from seniority when he distributed work. However, Petitioner did not adduce the dispatcher's name, the dates, or the circumstances, leaving it unclear whether the dispatcher was carrying out orders or acting on his own. Further, General Manager Snyder testified that dispatchers are required to follow seniority and are counseled for not doing so, thereby suggesting that any departure from that practice in the past would have been unauthorized. Supervisory status may not be predicated upon *ultra vires* practices. See *Billows Electric Supply*, 311 NLRB 878, 879 (1993) (sporadic or discrete instance of supervisory action not enough).

Petitioner alleges that the company handbook portrays dispatchers as supervisors. In fact, the handbook refers to "supervisor" without defining it, leaving it open as to whether the term means dispatchers or higher management. Section 400 regarding "Work Hours" mentions "dispatch or your supervisor," implying that the terms are divisible. At any rate, even if the handbook labeled dispatchers as supervisors, this alone would not convey authority under Section 2(11). *Gem Urethane Corp.*, 284 NLRB 1349 (1987) (titles or lack thereof not sufficient); *Blue Star Ready-Mix Concrete Corp.*, supra at 430 (holding out as supervisor not necessarily dispositive of status); *Polynesian Hospitality Tours*, 297 NLRB 228 (1989), enfd. 920 F.2d 71 (D.C. Cir. 1990), cert. denied 502 U.S. 810 (1991) (same); see *Masterform Tool Co.*, supra at 1072 (employees' perception not sufficient basis).

Contrary to Petitioner, I find that dispatchers do not exercise independent judgment in laying off drivers. Drivers' ranks are winnowed by the combined operation of customer demand and driver seniority. It is General Manager Snyder who ultimately decides when a driver is in layoff status. The record is silent as to any input dispatchers provide regarding when to recall drivers, and in what order, once business increases.

The dispatchers at issue do not hire, promote, discharge, or reward other employees. They do not resolve employee grievances, nor play any role in assessing attendance or granting merit raises. Their responsibility with respect to time-off requests is ministerial. There is no evidence that they participate at all in the Shafer Companies' progressive disciplinary system. Although they describe events to their superiors when attending management meetings and at other times, this reportorial function is informational, not recommendatory, and therefore not the basis for a supervisory finding. *Ryder Truck Rental*, supra; *MJ Metal Products*, 325 NLRB 240 (1997); *Passavant Health Center*, 284 NLRB 887, 892 (1987); *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965); see also *Williamson Memorial Hospital*, 284 NLRB 37 (1987) (attendance at management meetings not enough for supervisory finding).

Based on the foregoing, I find that dispatchers are statutory employees. This conclusion, however, does not resolve the issue of their unit placement. Petitioner's single-employer and community-of-interest arguments must also be addressed.

The designation "single employer" describes a situation where nominally separate entities operate as an integrated enterprise so that there is, in fact, only a single employer. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3rd Cir. 1982). The principal factors that the Board considers are the extent of operational interrelation, common management, common ownership or financial control, and centralized control of labor relations. All four criteria need not be present and none is controlling. *Pioneer Recycling Corp.*, 323 NLRB 652, 657 (1997). Common ownership or financial control is often characterized as the least important factor. *Truck & Dock Services*, 272 NLRB 592, 594 fn. 2 (1984); *NLRB v. Triumph Curing Center*, 571 F.2d 462, 467 (9th Cir. 1978), enfg. 222 NLRB 627 (1976).

Redi-Mix and Brothers are owned by the same nuclear family. Brothers not only uses the concrete manufactured by Redi-Mix, but is its primary customer. They operate out of the same location. Their employees are commonly supervised and subject to the identical terms and conditions of employment as expressed in the Shafer Companies handbook. Interchange of drivers between the companies is frequent and regular. Although the two companies are separately incorporated and

issue separate paychecks to their respective workforces, all checks are signed by Esther Shafer. Gerald Shafer chose the health insurance provided to full-time employees of both companies. Redi-Mix admits that it and Brothers are a single integrated enterprise.

I reject Petitioner's claim that the record is inadequate to render a decision on this issue.⁷ The companies are functionally interrelated and operationally interdependent. Management and labor relations control are common. *Centurion Auto Transport*, 329 NLRB 394 (1999). The family connection, with parents owning Redi-Mix and sons owning Brothers, is treated the same as coincident personal ownership. *Truck & Dock Services*, supra; *Bryar Construction Co.*, 240 NLRB 102, 104 (1979). Redi-Mix's admission of its relationship to Brothers weighs heavily, *Beverly California Corp.*, 326 NLRB 232, 241 (1998), enfd. in relevant part 227 F.3d 817 (7th Cir. 2000), and is supported by the record. I find that Redi-Mix and Brothers are a single employer.⁸

A single-employer finding does not ineluctably end the inquiry. Resolution of unit composition issues begins with examination of the petitioned-for unit. Only if it is inappropriate will alternative units be found. *Bartlett-Collins Co.*, 334 NLRB No. 76, slip op. at 1 (July 11, 2001). In determining whether the sought unit is inappropriate, the Board is guided by the principle that it need find only *an*, not the *most*, appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 419 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951). A union's desire is always a relevant, although not a dispositive, consideration. *E. H. Koester Bakery & Co.*, 136 NLRB 1006 (1962).

If Petitioner's preferred grouping is found inappropriate, the Employer's urged inter-company unit must also be proven to be appropriate. *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976); *Edenwald Construction Co.*, 294 NLRB 297 (1989). Appropriateness normally depends upon community-of-interest factors such as mutuality of interest in wages, hours, and working conditions; commonality of supervision; degree of skill and common functions; frequency of

⁷ Petitioner complains that it had no advance notice that single employer would be urged. Although notice is desirable, nothing precludes parties from interposing issues *de novo* at pre-election hearings. Board's Rules and Regulations Sections 102.63 - 102.64; Board's Statements of Procedure Section 101.20. Parties frequently do so. Petitioner briefed the single-employer issue. The record does not indicate that it sought a postponement or was denied an opportunity to explore the issue fully at the hearing. In sum, Petitioner was accorded due process.

⁸ Petitioner's invocation of the consent requirement in *Greenhoot*, 205 NLRB 250 (1973), is misplaced. Such consent is required in certain cases where joint, not single, employer is alleged. Further, Redi-Mix's insistence that its workforce should be combined with that of Brothers would supply any needed consent.

contact and interchange; and functional integration. ***Ore-Ida Foods***, 313 NLRB 1016 (1994).

All of the drivers and dispatchers are supervised by the same individual. They work at and out of the same facility. Their working rules and benefits are identical. Their wages fall within the same range and are eligible for enhancement by the same method, i.e., six-month reviews by General Manager Snyder. Interchange between ready-mix and boom truck drivers is a normal occurrence, and dispatchers also regularly drive when needed. The same licensure is required for all drivers. Because dispatchers dispense concrete and distribute runs and other work, contact between dispatchers and drivers is close. There is also a demonstrable connection between ready-mix and boom truck drivers, in that they report to the same dispatchers, may drive each other's trucks, and, when supplemental concrete supplies must be transported, make deliveries to the same sites.

The community-of-interest evidence noted above renders the petitioned-for unit limited to ready-mix and bulk drivers at Redi-Mix inappropriate. I find, instead, that a unit of drivers and dispatchers throughout the single employer is the smallest appropriate unit. ***Carpenter Trucking***, 266 NLRB 907 (1983) (unit amalgamating several kinds of drivers found appropriate despite union's petition for one classification of driver only); see also ***Home Depot USA***, 331 NLRB No. 168 (Aug. 25, 2000) (unit of drivers and dispatchers found appropriate); ***Newport Meat Co.***, 331 NLRB No. 107 (July 25, 2000) (unit of all drivers and dispatchers found appropriate in test of certification case).⁹

5. Accordingly, I find that the following employees of Redi-Mix and Brothers, a single employer, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:¹⁰

All full-time and regular part-time ready-mix, bulk, and boom truck drivers and dispatchers employed by Shafer Redi-Mix, Inc. and Shafer Brothers, Inc., a single employer, at and out of their facility located at

⁹ The parties stipulated at the hearing that Petitioner represented "employees" at the "Employer's" Albion plant until 10 years ago, when it was decertified. As the stipulation does not shed light on the unit at the time of the decertification or the precise employer involved, it is too incomplete to guide resolution of the questions at hand.

¹⁰ As the unit found appropriate (25) is larger than the unit requested in the petition (12), Petitioner is accorded a period of 14 days from the date of the Decision and Direction of Election in which to submit to the undersigned an additional showing of interest, if needed. In the event the Petitioner does not wish to proceed with an election, it may withdraw its petition without prejudice by notice to the undersigned within 14 days from the date of this Decision and Direction of Election.

29150 C Drive North, Albion, Michigan; but excluding all mechanics, professional employees, clerical employees, guards and supervisors as defined in the Act, and all other employees.

Those eligible to vote shall vote whether they wish to be represented by Local 164, International Brotherhood of Teamsters, AFL-CIO.

Dated at Detroit, Michigan, this 12th day of February, 2002.

(SEAL) /s/ William C. Schaub, Jr.
William C. Schaub, Jr., Regional Director
National Labor Relations Board, Seventh Region
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

177-8560-1000
440-1760-6200
177-1642-0100